

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**BARBARA SHIPLEY**  
Claimant

VS.

**BECKWELL INTERNATIONAL, INC.**  
Respondent

AND

**INSURANCE COMPANY OF NORTH AMERICA**  
Insurance Carrier

AND

**KANSAS WORKERS COMPENSATION FUND**

Docket No. 181,123

**ORDER**

Claimant appeals from an Award of Administrative Law Judge Robert H. Foerschler dated July 17, 1995, amended by Nunc Pro Tunc order dated July 24, 1995. The Appeals Board heard oral arguments January 16, 1996.

**APPEARANCES**

The claimant appeared by her attorney James R. Shetlar of Overland Park, Kansas. The respondent and its insurance company appeared by their attorney Marcia Yates of Kansas City, Missouri. The Kansas Workers Compensation Fund appeared by its attorney Frank A. Caro, Jr. of Overland Park, Kansas.

**RECORD AND STIPULATIONS**

The Appeals Board has reviewed the record listed in the Award. The Appeals Board has also adopted the stipulations listed in the Award.

**ISSUES**

On appeal, claimant raises the following issues:

- (1) The constitutionality of the Kansas Workers Compensation Act;
- (2) Use of IME in a pre-July 1993 injury;
- (3) Admission of an IME report in contravention of K.S.A. 44-519;  
and
- (4) Nature and extent of disability.

As part of its argument relating to nature and extent of claimant's disability, claimant argues that the Administrative Law Judge has changed the burden of proof to one requiring clear and convincing evidence. Claimant also argues that the Administrative Law Judge

improperly applied the PIK standard which allows negative inference from failure to offer evidence, in this case neurological evidence.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

(1) The Appeals Board is not a court established pursuant to Article III of the Kansas Constitution and, therefore, does not have the authority to declare an act of the Kansas Legislature to be unconstitutional. See, e.g. Billy J. Walker v. Boeing Military Airplanes, Docket Nos. 158,685 and 180,248 (April 1995).

(2)(3) Claimant challenges the use of the IME in this case on two bases. Claimant first argues that the Administrative Law Judge should not have required an independent medical examination because the claim involves an accident which occurred prior to July 1, 1993. By amendment effective July 1, 1993, K.S.A. 44-510e requires independent medical examination in cases where the employer and employee are unable to agree on the employee's functional impairment. Claimant contends the mandatory IME is a substantive change, not procedural and, therefore, pertains only to claims involving injury after July 1, 1993.

Claimant next argues the Administrative Law Judge erred by considering the IME in contravention to K.S.A. 44-519. K.S.A. 44-519 requires testimony of the healthcare provider to support admission of any report from that healthcare provider. In this case no deposition was taken to support the admission of the IME report. However, 1993 amendments to K.S.A. 44-510e not only require that an IME be performed if the parties cannot agree on the functional impairment; the same statute also provides that the opinion of the independent medical examiner "shall be considered by the administrative law judge in making the final determination."

Both of the arguments made by claimant suffer from the same defect. Claimant did not advise the Administrative Law Judge of any objection either to the ordering of the IME or the admission of the report into evidence. The Appeals Board will not consider issues raised for the first time on appeal. Scammahorn v. Gibraltar Savings & Loan Assn., 197 Kan. App. 410, 416 P.2d 771 (1966).

(4) The Appeals Board agrees with and affirms the finding by the Administrative Law Judge that claimant sustained a 10 percent permanent partial general disability.

Claimant worked for respondent as a supervisor on an assembly line packaging medical kits. The work involved lifting and placing boxes of product from a pallet onto the conveyor. She began experiencing discomfort in her left shoulder and neck area, as well as headaches. She also suffered low back pain. The symptoms on the left included pain down her left arm. Her hand and fingers would become numb. She initially had symptoms on the right shoulder and arm as well. The symptoms on the right resolved, but the problems with the left remained. After examination and treatment by several physicians she ultimately underwent surgery. Dr. Brad Storm performed a breast reduction in December of 1992 and Dr. Franklin Bichlmeier performed a rib resection for thoracic outlet syndrome in January of 1993.

Claimant asserts that the Administrative Law Judge applied improper standards in weighing the evidence. Claimant refers first to language on page 6 of the Award where the Administrative Law Judge discusses consideration he gave to the independent medical examination. The Administrative Law Judge indicates there that he is obligated by statute to consider the report and, according to the Administrative Law Judge "There must be some convincing contradictory evidence to permit its disregard." Claimant contends the Administrative Law Judge has, thereby, changed the standard to one requiring clear and convincing evidence. Claimant next argues that the Administrative Law Judge erred by drawing a negative inference from the absence of certain neurological evidence. The Administrative Law Judge does not indicate what neurological evidence he might have expected.

The Appeals Board conducts a de novo review. Although the Appeals Board does not believe the Administrative Law Judge required clear and convincing evidence, the Appeals Board has, for purposes of its review, required only that the claimant prove the element of her claim by a preponderance of the credible evidence. The Appeals Board also notes there were several tests performed which might be referred to as neurological. Several EMGs were introduced, including one which demonstrated an abnormality at C8-T1. The Appeals Board has drawn no special negative inference from the absence of testing by a neurologist or neurosurgeon.

The principle dispute in this case relates to which of claimant's various injuries or symptoms were caused or aggravated by claimant's work activities. The record on this claim includes testimony which refers to symptoms of the cervical spine, the shoulder, the thoracic outlet area and low back.

The Appeals Board agrees with the finding that only the shoulder and the cervical spine injuries and symptoms were work related. Claimant had a prior work-related injury to her low back. She settled a claim to her low back on the basis of 15 percent permanent partial general disability. The highest and only rating of the low back in this case rates her current low back condition at slightly less than the 15 percent preexisting impairment. Claimant has testified that the current low back problems included radiating pain that she had not had previously. However, medical records indicate that, in fact, she had radiating pain as a result of her prior low back injury. The Appeals Board finds claimant has failed to establish by a preponderance of the credible evidence that the low back condition had permanently worsened as a result of claimant's work activities.

The Appeals Board also finds that the thoracic outlet syndrome and related symptomatology is not work related. Claimant had a congenital condition, specifically, a cervical rib off the lowest cervical vertebra. Although Dr. John A. Pazell testified he felt thoracic outlet syndrome may have been aggravated by overhead work, the Appeals Board finds the evidence does not support that conclusion. Generally, the evidence suggests claimant did work for the most part at or below waist level. Although claimant apparently advised Dr. Pazell of overhead work, Dr. P. Brent Koprivica testified claimant indicated in response to direct questions that she did not do overhead work. The Appeals Board finds that as a whole the record does not establish a significant amount of overhead work and also finds that the work did not cause or aggravate or accelerate the thoracic outlet syndrome.

The Appeals Board agrees claimant suffered neck and shoulder symptoms as a result of her work activities. These were rated by Dr. Koprivica as a 10 percent permanent partial general impairment. Dr. Bruce D. Geller, the independent medical examiner, concluded there was no permanent impairment as a result of work activities. Dr. Pazell appears to attribute 12 percent of his 38 percent impairment to cervical spondylosis. Dr. Koprivica's rating of 10 percent is based upon a diagnosis of probable fibromyalgia. Based upon a review of the entire record, the Appeals Board finds that the 10 percent permanent partial general disability award by the Administrative Law Judge fairly and accurately assessed the claimant's impairment and awarded appropriate benefits for that impairment.

The Appeals Board notes finally that claimant has returned to work at a comparable wage with accommodation by respondent. Claimant is, therefore, limited to an award based upon functional impairment and not entitled to work disability. K.S.A. 187 Supp. 44-510e.

### **AWARD**

**AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Barbara Shipley, and against the respondent, Beckwell International, Inc., and its insurance carrier, Insurance Company of North America, for an accidental injury which occurred September 2, 1992 and based upon an average weekly wage of \$348.00, for 15 weeks of temporary total disability compensation at the rate of \$232.01 per week or \$3,480.15, followed by 400 weeks at the

rate of \$23.20 per week or \$9,280.00 for a 10% permanent partial whole body impairment of function, making a total award of \$12,760.15.

As of February 29, 1996, there is due and owing claimant 15 weeks of temporary total disability compensation at the rate of \$232.01 per week or \$3,480.15, followed by 167.29 weeks of permanent partial disability compensation at the rate of \$23.20 per week in the sum of \$3,881.13, for a total of \$7,361.28 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$5,398.87 is to be paid for 232.71 weeks at the rate of \$23.20 per week, until fully paid or further order of the Director.

The sum of \$350.00 is awarded as unauthorized medical expense for the services of Dr. Pazell.

Costs of transcripts in the record are taxed against respondent and its insurance carrier as follows:

Gene Dolginoff, Ltd.	\$371.05
Hostetler & Associates, Ltd.	\$850.85

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of January 1996.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James R. Shetlar, Overland Park, KS  
Marcia Yates, Kansas City, MO  
Frank A. Caro, Jr., Overland Park, KS  
Robert H. Foerschler, Administrative Law Judge  
Philip S. Harness, Director